No. 239

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IN THE

SUPREME COURT OF THE UNITED STATES.

MARION M. PICKLE, JR.,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

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Assistant Attorney General,
State of Tennessee.

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May It Please the Court:

The petitioner, Marion M. Pickle, Jr., was convicted of an assault and battery. A fine of $51.00 was imposed upon him by the trial jury and a sentence of ninety days in the County Workhouse was added by the Trial Judge. The conviction was appealed to the Tennessee Supreme Court and the Tennessee Supreme Court affirmed the conviction of the trial court. As stated by counsel for the petitioner, the opinion has not been published officially nor unofficially but is made Appendix A-1 to the petition for certiorari.

Counsel for the petitioner insists that the petition presents two questions (1) whether or not the petitioner was

denied due process of law and equal protection of the law as guaranteed him by the Fourteenth Amendment, Constitution of the United States because of having been tried by "an illegally hand-picked" jury, and (2) whether or not the petitioner was denied due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment, Constitution of the United States because the Supreme Court of Tennessee refused to require a diminution of the record to supply a portion thereof which showed the grand jury and petit jury were illegally selected.

BRIEF AND ARGUMENT.

Counsel for the State of Tennessee insists that there is no evidence in the record to show that the grand jury which indicted the petitioner nor the petit jury which convicted him were not properly selected. Counsel for the petitioner does not insist that there is such evidence in the record. He only insists that a diminution of the record should have been ordered for the purpose of showing that the grand jury and the petit jury were not legally selected.

The Supreme Court in its opinion stated on this question:

> "Defendant filed a plea in abatement, supported by affidavit to the effect the grand jury rendering the indictment under which he was convicted was not chosen according to law, same being Chapter 173, Private Acts of 1911, as amended. The order of the Trial Judge overruling this plea recites the Court heard the evidence offered by the defendant, but does not recite the evidence; and further defendant was given 90 days to prepare and file a bill of exceptions containing this evidence, which has not been done. Since we cannot tell whether the record before us contains all the evidence heard by the Trial Judge on this plea, as the record does not affirmatively show it to be all the evidence, then such cannot be reviewed here on appeal. Eatherly v. State, 118 Tenn. 371; Hall v. Hall, 193 Tenn. 74. The first assignment of error is overruled."
>
> **Appendix A2.**

It has long been well settled in this State that the ruling of a trial judge upon a question involving disputed or controverted facts will not be reviewed by the Supreme Court where the record fails to show affirmatively that

it contains all the evidence heard by the trial judge on such question. **Eatherly v. State**, 118 Tenn. 371. This meets the requirements of due process and equal protection as set out in **Leeper et al. v. State of Texas**, 139 U. S. 225, to the effect that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law: that law in its regular course of administration through court of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary powers of the government unrestrained by the established principles of private right and distributive justice. **Hurtado v. California**, 110 U. S. 516, 535.

It is next insisted that a diminution of the record should have been ordered to show that the grand jury and petit jury were illegally selected. The portion of the record petitioner desired to have supplied by the clerk of the court below to show that these juries were illegally selected was made exhibits to the motion. The Supreme Court of Tennessee considered these exhibits and concluded that if the record were diminuted to the extent requested, it would not aid the petitioner. The Tennessee Supreme Court's reply to the motion was as follows:

> "In our opinion, these minute entries wholly fail to show the manner in which the individuals on these jury lists were selected. It follows from this that the entries could not show that the jury lists was compiled in a manner contrary to Chapter 178, Private Acts of 1911. While it is true that these minute entries show that the Chairman of the Jury Commission presented jury lists to the court below they

wholly fail to show how the names on the list were selected and who selected them. In fact, these entries fail to show anything about the manner in which the names were selected."

Appendix A6-A7.

Counsel for the Respondent insists that the Tennessee Supreme Court was eminently correct in denying the motion on the grounds that it would have added nothing pertinent to the question being raised in petitioner's behalf. It is difficult to understand how it could be thought the Tennessee Supreme Court could have held otnerwise on this question. At any rate, this had been the rule followed by the Tennessee Supreme Court on this question, **Standard Life Insurance Company of the South v. Adams**, 174 Tenn. 405, and, therefore, squares with the rule announced in the **Leeper** case and stated above.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I forwarded a copy of this Answer to Petition for Writ of Certiorari to Mr. William E. Badgett, Attorney at Law, 608 Bank of Knoxville Building, Knoxville, Tennessee, on this the 16 day of July, 1964.

Thomas E. Fox,
Assistant Attorney General.